Supreme Court, U.S.
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NO. 94 537

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

CHAD GODFREY,
Petitioner

VS.

THE UNITED STATES OF AMERICA
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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17 pp

QUESTION PRESENTED

I. Whether the Fifth Circuit Court of Appeals' ruling that the same conduct of a defendant can be double-counted under the United States Sentencing Guidelines if it is not expressly forbidden:

a) Is in conflict with the Sixth Circuit Court of Appeals decision in United States v. Romano, infra;

b) Is constitutionally infirm in that it is in violation of the Double Jeopardy Clause and offends due process.

LIST OF PARTIES IN APPELLATE COURT

Chad Godfrey,

Appellant,

United States of America,

Appellee

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REFERENCE TO OPINIONS OF LOWER COURT

The opinion of the Fifth Circuit Court of Appeals is reproduced in the appendix.

JURISDICTION

The Court of Appeals had appellate jurisdiction over the district court's final judgment in this criminal case, pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291. The panel's order was entered on June 24, 1994. See A-3. Consistent with this Honorable Court's Rule 13, this Petition is timely filed. This Court's jurisdiction in the instant case is based on 28 U.S.C. § 1254(1), and United States Supreme Court Rule 10.

CONSTITUTIONAL PROVISION AT ISSUE

1. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution states:

> "...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb..."

2. The Due Process Clause of the Fifth Amendment to the United States Constitution states:

> "[N]or shall any person be deprived of . . . liberty . . . without due process of law."

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked pursuant to the indictment filed in the United States district court for the Southern District of Texas, Houston, Division.

The Petitioner, Chad Godfrey, was indicted on April 10, 1992, by a federal grand jury in the Southern District of Texas. The indictment charged him in Count One with conspiracy to violate the laws of the United States in respect to bank fraud and misapplication by a bank officer, in violation of 18 U.S.C. § 371; in Counts Two and Four with aiding and abetting money laundering, in violation of 18 U.S.C. §§ 2 and 1956(a)(1)(A); in Counts Three, Eight, Nine and Ten with aiding and abetting the transportation of stolen goods, in violation of 18 U.S.C. §§ 2 and 2314; in Counts Five, Six and Seven

with aiding and abetting misapplication by a bank officer, in violation of 18 U.S.C. §§ 2 and 656; and in Count Eleven with bank fraud, in violation of 18 U.S.C. § 1344.

On October 23, 1992, Petitioner appeared before the Honorable Sim Lake and entered a plea of guilty to Count One of the indictment.

The Pre-Sentence Investigation Report revealed that Petitioner and several co-conspirators devised a scheme whereby they would create shell companies to purchase controlling interests in several ailing Texas banks with small amounts of money, then cause the management of the target banks to purchase worthless debentures issued by companies owned by co-defendant James Barrus, Jr.

The proceeds from the debenture sales would be deposited in accounts held by

Barrus-controlled entities and used to purchase additional distressed banks. The conspirators would crate counterfeit certificates of deposit and phony financial statements prepared by non-existent accounting firms to create the appearance of financial assets and fraudulently obtained loans for the acquisitions.

Furthermore, Petitioner was alleged to be the leader of one of the two groups operating during the scheme. He purportedly instructed other co-conspirators to carry out the purchase of at least two banks.

The Petitioner was sentenced under the United States Sentencing Guidelines, whereby he was sentenced to confinement for a total of twenty-one (21) months.

ARGUMENT

I.

THE COURT'S HOLDING THAT THE SAME CONDUCT CAN BE PUNISHED JOINTLY AND SEVERALLY UNDER TWO SEPARATE PROVISIONS OF THE SENTENCING GUIDELINES IS IN CONFLICT WITH OTHER CIRCUIT COURTS OF APPEAL

The United States Sentencing Guidelines calculates a sentence based upon offense conduct relative to a defendant and that defendant's role in the offense. See U.S.S.G. Chapters 2 and 3. In the instant case, the Fifth Circuit utilized the same conduct of Petitioner in assessing both the offense conduct (U.S.S.G. §2F1.1) and his role (U.S.S.G. § 3B1.1), thus double-counting the conduct in such a manner which increased his punishment. The Court held that double-counting is permissible under the guidelines. Specifically, the Court's finding that Petitioner could receive a

sentence enhancement under both U.S.S.G. § 2F1.1 and § 3B1.1, is in conflict with another circuit court of appeal and merits review by this Honorable Court. See United States Supreme Court Rule 10.1(a).

Section 3B1.1(a) U.S.S.G. provides a sentence enhancement for a defendant who played an aggravating role in the criminal activity. Section 2F1.1(b)(2) provides a sentence enhancement if a defendant engaged in more than minimal planning or engaged in a scheme to defraud more than one victim. (Both ways certainly implicate greater culpability on the part of the perpetrator).

In United States v. Romano, 970 F.2d 164 (6th Cir. 1992), the Sixth Circuit Court of Appeals held that application of both § 3B1.1(a) and § 2F1.1(b)(2) to the same defendant is improper because it punishes the same conduct. The Court

further held that it violates established principles of lenity and due process to enhance a defendant's sentence again for the same conduct. Id.

The Eighth Circuit Court of Appeals has held that the Sentencing Commission did not intend for the same conduct to be punished cumulatively under separate Guidelines provision. United States v. Werlinger, 894 F.2d 1015, 1017 (8th cir. 199). The Werlinger court further stated that imposing a rule against double counting is consistent with this Honorable Court's decisions that have required a clear expression of legislative intent to apply sentence enhancement provisions cumulatively. Id. (citing Busic v. United States, 446 U.S. 398 (1980); and Simpson v. United States, 435 U.S. 6 (1978)).

In the absence of legislative intent, and in accordance with the general rule of

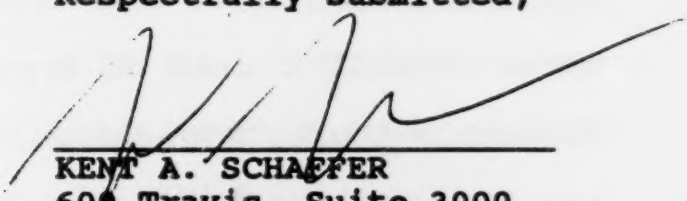
lenity in criminal cases, it is improper to double-count the same conduct under the sentencing guidelines. Furthermore, to punish the same conduct twice is clearly a violation of the Double Jeopardy clause.

The panel has rendered an opinion applying the United States Sentencing Guidelines in an unconstitutional manner, which is in conflict with the decisions of other circuit courts of appeals and this Honorable Court. Therefore, a compelling basis exists for this Court to grant the instant Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reason, the Petitioner respectfully submits that this Honorable Court should grant this Petition for Writ of Certiorari, reverse the judgment of the Fifth Circuit Court of Appeals, vacate the sentence, and remand the cause for re-sentencing.

Respectfully submitted,



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